

**A UOL Credit Sdn Bhd v Dato' Vijay Kumar Natarajan**

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–38 OF 2008(W)

**B** ZAKI AZMI CHIEF JUSTICE, ARIFIN ZAKARIA CJ (MALAYA) AND  
GOPAL SRI RAM FCJ  
25 NOVEMBER 2009

**C** *Civil Procedure — Inherent powers — Federal Court — Appellant filed application under r 137 of the Rules of the Federal Court to review and set aside earlier decision made by Federal Court — Whether grant of leave upon question imposed duty on court to answer it — Whether appellant's argument that its appeal was never heard relevant — Whether appeal ought to be reinstated*  
**D** — *Whether there was injustice to appellant — Rules of the Federal Court 1995 r 137*

**E** The present application was made by the appellant under r 137 of the Rules of the Federal Court 1995 to review and set aside an earlier decision made in this case. Earlier in the case, the appellant had failed in its action against the respondent before the High Court and the Court of Appeal. Subsequently, on 17 September 2008, the appellant obtained leave of appeal on the question posed. The respondent then filed a motion to set aside the leave granted and  
**F** alternatively for leave to adduce further evidence. The appeal and the motion both came on for hearing on 10 March 2009 before a differently constituted panel. At that stage, the respondent amended his motion for the main prayer to read: 'that this Court ought not to answer the question posed on 17 September 2008'. The amendment was unopposed, and the motion was argued. At the  
**G** end of the case, the court dismissed the appeal and made the usual consequential orders. Based on the above undisputed facts, the appellant submitted that it was entitled to have the order of 10 March 2009 set aside and to have the appeal reinstated for hearing.

**H** **Held**, dismissing the application with costs:

(1) It was now settled that the grant of leave upon question did not impose a duty on the court to answer it. In the present case, it was undisputed that there was full argument on the issue of whether leave was rightly granted.  
**I** There was therefore no procedural unfairness at all on that account. On the present state of the authorities, the complaint by the appellant that its appeal was never heard, appeared to be irrelevant. For, an appellant who had obtained leave ought to be prepared to defend the grant of leave at any subsequent stage (see paras 4 & 6).

- (2) In the present action, the record showed that the appellant was called upon to defend the leave it had earlier obtained. That was done on the respondent's amended motion. There was full argument on the point. This court was obviously satisfied that leave ought not to have been granted. Hence it dismissed the appeal. That was not an injustice to the applicant (see para 8).

A

B

**[Bahasa Malaysia summary]**

Permohonan ini dibuat oleh perayu di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 untuk menyemak dan mengetepikan keputusan awal yang dibuat dalam kes ini. Terdahulu dalam kes ini, perayu telah gagal dalam tindakannya terhadap responden di hadapan Mahkamah Tinggi dan Mahkamah Rayuan. Seterusnya, pada 17 September 2008, perayu memperolehi kebenaran rayuan atas persoalan yang ditimbulkan. Responden kemudian memfailkan usul untuk mengetepikan kebenaran yang diberikan dan secara alternatif kebenaran untuk mengemukakan keterangan lanjut. Rayuan dan usul kedua-duanya bersidang pada 10 Mac 2009 di hadapan panel yang berbeza. Pada peringkat itu, responden meminda usulnya untuk tuntutan utama supaya dibaca sebagai: 'bahawa mahkamah ini tidak sepatutnya menjawab soalan yang diajukan pada 17 September 2008'. Pindaan itu tidak dipertikaikan, dan usul itu dibicarakan. Di akhir kes tersebut, mahkamah telah menolak rayuan dan membuat perintah berikutnya seperti biasa. Berdasarkan fakta-fakta yang tidak dipertikaikan di atas, perayu berhujah bahawa ia berhak mendapat relif agar perintah bertarikh 10 Mac 2009 diketepikan dan rayuannya dikembalikan untuk pendengaran.

C

D

E

F

**Diputuskan,** menolak permohonan dengan kos:

- (1) Ia kini telah ditetapkan bahawa pemberian kebenaran ke atas persoalan yang diajukan tidak mewajibkan mahkamah untuk menjawabnya. Dalam kes ini, tidak dapat dipertikaikan bahawa terdapat hujah penuh mengenai isu sama ada kebenaran diberikan dengan betul. Oleh itu, tiada ketidakadilan prosedur di dalam semua keadaan tersebut. Dalam keadaan semasa autoriti-authoriti, aduan oleh perayu bahawa rayuannya tidak pernah didengar kelihatan tidak relevan. Kerana, perayu yang telah memperoleh kebenaran sepatutnya bersedia untuk membela pemberian kebenaran pada mana-mana peringkat seterusnya (lihat perenggan 4 & 6).
- (2) Dalam tindakan ini, rekod menunjukkan bahawa perayu dipanggil untuk membela kebenaran yang telah diperolehinya. Itu telah dilakukan pada usul yang dipinda oleh responden. Terdapat hujah penuh bagi perihal tersebut. Mahkamah juga jelas berpuas hati bahawa kebenaran tidak sepatutnya diberikan. Oleh itu ia menolak rayuan tersebut. Itu bukanlah ketidakadilan kepada pemohon (lihat perenggan 8).]

G

H

I

**A Notes**

For cases on Federal Court, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3952–3953.

**Cases referred to**

- B** *Badan Peguam Malaysia v Kerajaan Malaysia* [2009] 1 CLJ 833, FC (refd)  
*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257; [2003] 3 CLJ 349, FC (refd)

**C Legislation referred to**

- C** Rules of the Federal Court r 137

*K Anantham (Preetha Pillai with him) (Skrine) for the appellant.*  
*GK Ganesan (KVibalananthan with him) (Kumar Jaspal Quah & Aishah) for the respondent.*

**D**

**Gopal Sri Ram FCJ:**

- E** [1] This is an application said to be made under r 137 of the Rules of the Federal Court to review and set aside an earlier decision made in this very case. The relevant facts are as follows. The applicant (appellant in the substantive appeal) failed in the litigation it had with the respondent at two levels — before the High Court and the Court of Appeal. It then applied and, on 17 September 2008, obtained leave to appeal to this court on the following question:

- F** Whether when in interpreting a general release and/or a clause in the agreement containing a general release, it is ever permissible in law to take a literal rather than contextual interpretation of the same by ignoring the surrounding circumstances or factual background known to the parties at or before the date of the release.

- G** [2] On 17 December 2008, the respondent took out a motion to set aside the leave granted and in the alternative for leave to adduce further evidence. It appears from the record of this court that the appeal and the motion both came on for hearing on 10 March 2009 before a differently constituted panel. At that stage, the respondent amended his motion for the main prayer to read as follows:

- H** that this Court ought not to answer the question posed on 17.9.2008.
- I** According to the evidence filed before us, the amendment was unopposed and the motion was argued. At the conclusion of arguments, the court dismissed the appeal and made the usual consequential orders. The appellant's case based on these undisputed facts is that it is entitled to have the order of 10 March 2009 set aside and to have the appeal reinstated for hearing.

[3] Now, I must confess that when I first read the cause papers I formed the view that the appellant was right in its contention. However, having re-read the papers and the relevant authorities, I am now satisfied beyond a doubt that the initial view I formed was wrong and that this application must be dismissed. My reasons are as follows.

[4] It is now settled that the grant of leave upon a question does not impose a duty on this court to answer it. Put differently, there is no legitimate expectation in an appellant by the mere grant of leave that the question posed will be answered. There are several cases that make this plain. But I find it sufficient to quote merely from one of them.

[5] In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257; [2003] 3 CLJ 349, Abdul Malek Ahmad FCJ put the point in plain terms:

The common feature in the *Capital Berhad's* case (*Capital Insurance Bhd v Asiah Abdul Manap & Anor* [2000] 4 MLJ 655), the *Raphael Pura* case (*supra*) (*Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513) and *The Minister for Human Resources' case* (*The Minister for Human Resources v Thong Chin Yoong And Another Appeal* [2001] 4 MLJ 225) is that the merits had not been dealt with in the Court of Appeal. Further, after leave had been granted on those cases, a preliminary objection had been raised at the appeal stage to establish the point that leave should not have been given. All three appeals had been dismissed with costs without going into the merits when this court upheld the preliminary objections. The situation is somewhat different here as both the High Court and the Court of Appeal had actually dealt with the matter on the merits. It was not simply a matter of a lack of jurisdiction. Further, no preliminary objection had been raised at the appeal stage before us against the granting of the leave.

Despite that, in the light of the authorities, we would hold that we are not prevented from reconsidering the issue of leave again. Coming back to the questions formulated for determination by this court, it is our view that the questions do not involve a question of importance upon which further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s 96(a) of the CJA and, therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

[6] The proposition that is supported by *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* is that it is open to a respondent to contend at the hearing of the merits of an appeal that leave ought not to have been granted in the first place. And it is then open to the panel hearing the appeal to so rule. In some of the cases the point was taken by way of a preliminary objection. In *Sri Kelangkota-Rakan Engineering JV Sdn*

- A *Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* it was by way of argument during the merits hearing. In the present case it was taken by way of an amended motion. So, it really boils down to the procedure or form adopted in a given case. In the present instance there was full argument on the issue of whether leave was rightly granted. That is undisputed. There was therefore no
- B procedural unfairness at all on that account. What the appellant complains is that its appeal was never heard. That, on the present state of the authorities, appears to be irrelevant. For, an appellant who has obtained leave must be prepared to defend the grant of leave at any subsequent stage.
- C [7] The extreme cases in which this court will act under r 137 were summed up by my learned brother, the Chief Justice, in *Badan Peguam Malaysia v Kerajaan Malaysia* [2009] 1 CLJ 833:
- D Before an application for review under r 137 can succeed, the applicant must show on the face of the record that there was injustice. That error must be obvious on the face of the record. It should be able to be seen just by reading the record that there was an error which obviously was an injustice.
- E [8] What does the record show here? It shows that the applicant was called upon to defend the leave it had earlier obtained. That was done on the respondent's amended motion. There was full argument on the point. This court was obviously satisfied that leave ought not to have been granted. Hence it dismissed the appeal. That is not an injustice to the applicant.
- F [9] For the reasons already given I would dismiss the application with costs.
- [10] My learned brothers, the Chief Justice and the Chief Judge of Malaya have read this judgment in draft and have expressed their agreement with it.
- G *Application dismissed with costs.*

Reported by Dzulqarnain Ab Fatar

H

I